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No. 91-406

Supreme Court, U.S.
FILED
OCT 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BRUCE L. WALLACE,
Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of the City of Norfolk, Virginia

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In its petition for certiorari, Southern Railway Company demonstrated that the Virginia state court's admission of certain Occupational Safety and Health Administration ("OSHA") regulations in a Federal Employers' Liability Act ("FELA") hearing loss case was clear error that raises an important and recurring issue of federal law, which has not been decided by this Court and which has been the subject of conflicting interpretations by the federal courts of appeal. Indeed, the decision below widened the split among the courts on the proper interpretation of section 4(b)(1) of the Occupational Safety and Health Act of 1970 ("OSH Act"), which allows "dominant" industry-specific federal agencies to preempt generic OSHA regulations. Respondent, while recognizing the existence of this split, makes four arguments against review: (1) that even if OSHA noise exposure regulations are preempted, their admission as

evidence of negligence was not error; (2) that any error was harmless; (3) that the circuit split on section 4(b)(1) preemption is not "profound"; and (4) that the potential for forum shopping in FELA cases is irrelevant to the Court's disposition of the petition. Respondent's arguments are not only baseless, but underscore the clear need for this Court's review.

1. Respondent does not dispute that the Federal Railroad Administration's ("FRA") exercise of its independent statutory authority has rendered OSHA noise regulations inapplicable to locomotive cabs.[1] Nor does he dispute that the court below instructed the jury that petitioner could be found negligent for failing to comply with those OSHA regulations in its locomotive cabs. Instead, respondent jumps to the startling and unsupportable conclusion that allowing a jury to base a negligence finding on the defendant's noncompliance with wholly inapplicable safety regulations is not error. No case—including the four "authorities" cited by respondent—has so held. In fact, in three of those cases, there was no dispute that the OSHA regulation in question *was* applicable, and the courts held only that violation of an *applicable* OSHA regulation is admissible as evidence of negligence.[2] And, the court of appeals in the fourth case held that a district judge *did err* when he included a

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[1] In his discussion of the circuit splits, the respondent does state that the FRA's 1978 Policy Statement "is insufficient to preempt OSHA regulations." Brief in Opposition at 19. Of course, the FRA did much more than issue a policy statement with respect to noise exposure; it promulgated specific "Locomotive cab noise" regulations. *See* Petition at 6.

[2] *See Rabon v. Automatic Fasterners, Inc.*, 672 F.2d 1231, 1238 (5th Cir. 1982); *Albrecht v. Baltimore & O.R.R.*, 808 F.2d 329, 332 (4th Cir. 1987); *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 266-67 (1st Cir. 1985). Indeed, the *Pratico* court devoted more than three pages of its opinion to the analysis supporting its express conclusion that the OSHA regulation was applicable. *Id.* at 258-62.

negligence per se instruction based upon violation of an inapplicable OSHA noise regulation.[3]

Establishing a regulation's applicability to the defendant's conduct is an absolute prerequisite to reliance on the defendant's noncompliance with that regulation as evidence of its negligence. Thus, while "violation of an enactment or regulation . . . may be relevant evidence bearing on the issue of negligent conduct," Restatement (Second) of Torts § 288B(2) (1965), where there is no applicability, there plainly can be no violation. *See also Ellis v. Caprice*, 233 A.2d 654, 662 (N.J. Super. Ct. App. Div.), *certif. denied*, 235 A.2d 901 (N.J. 1967) (noting that since the statute in question was inapplicable to the defendant's building, its breach was not admissible as evidence of his negligence, and that, in any event, "any probative value it possessed would have been more than offset by the possibility of prejudice arising from its submission to the jury"); W. Page Keeton *et al.*, Prosser and Keeton on the Law of Torts, § 36, at 220 (5th ed. 1984) (court must determine whether regulation "is applicable to the particular case, and whether it has in fact been violated").[4]

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[3] *See Barger v. Mayor & City Counsel of Baltimore*, 616 F.2d 730, 733 (4th Cir. 1980) *cert. denied*, 449 U.S. 834 (1980). That court affirmed *only* because the defendant had failed to make any inapplicability objection at trial and because, in that case, strict application of the Federal Rules of Civil Procedure did not result in a "miscarriage of justice." *Id.*

[4] Respondent's attempt to characterize OSHA noise regulations as relevant evidence of "custom" in the railroad industry is similarly misguided. The term "custom" denotes common practice in an industry. Where, as here, the regulations in question do not apply to the industry in question and were developed with *different* industries in mind and without consideration of the specific safety concerns of the industry in question, *see* note 5, *infra*, they clearly are not probative of industry custom. This is particularly true where, as here, competing industry-specific regulations are available (and were admitted).

Moreover, acceptance of respondent's "no error" theory would effectively write section 4(b)(1) preemption out of the OSH Act. Negligence standards regulate behavior just as statutes and regulations do. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). Thus, no matter how clear the dominant federal agency's exercise of its independent statutory authority to regulate workplace safety in a specific industry and no matter how strong the public interest in that agency's displacement of the generic OSHA regulations,[5] if respondent's theory were to prevail, employers would be forced—by the very real threat of crippling FELA negligence awards—to comply with putatively inapplicable OSHA regulations. Congress has not given the courts—state or federal—any such authority to regulate federal agency jurisdictional boundaries.

2. Respondent cites *no* authority for his equally baseless claim that the lower court's error in admitting the OSHA regulations and instructing the jury on their relevance was harmless. Respondent's theory appears to be that admission of and instruction on inapplicable regulations is harmless so long as the inadmissible evidence is not excessively emphasized and there is other evidence upon which the jury could rely. *See* Brief in Opposition at 7-8. Even were respondent's theory in accord with applicable law—and it is not—OSHA's noise exposure regulations were a *central* component of the respondent's case below: the respondent's expert referred to those

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[5] As the Association of American Railroads and the National Association of Railroad Trial Counsel illustrated in their amicus brief, there are a number of competing safety considerations in regulating noise levels in locomotive cabs. For example, locomotive horns must be loud enough to warn the public, but not so loud as to injure employees. *See* Amicus Brief at 9 n.6. Moreover, the use of personal hearing protection devices is constrained by the need to preserve the alertness of employees to hazards to passengers, bystanders, and other employees. *See* Petition at 6. The FRA noise exposure regulations respond to these industry specific safety concerns; OSHA's generic noise regulations obviously do not.

regulations more than a dozen times;[6] his counsel focused on the regulations in his closing argument, *see* Brief in Opposition App. at 6a, and the court specifically instructed the jury on the relevance of the OSHA regulations, *see* Petition App. at 15a-16a. Thus, even under respondent's erroneous standard, the lower court's use of inapplicable OSHA regulations was not harmless.[7]

In any event, respondent seriously misrepresents the relevant harmless error standard. "The general rule, usually stated without qualification, is that when one of two or more issues submitted to the jury was submitted erroneously, a general verdict cannot stand because it cannot be determined whether the jury relied upon the improper ground." *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1299 (10th Cir. 1989).[8] The jury in this case was repeatedly exposed to the erroneously admitted

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[6] *See, e.g.*, Transcript Vol. II-B at 494-95; *id.* at 497-99; *id.* at 508; Vol. III at 531; *id.* at 538; *id.* at 540-41; *id.* at 611-14; *id.* at 617; *id.* at 619.

[7] While respondent finds comfort in the fact that the jury was never flatly told that OSHA regulations "had direct application and independent regulatory effect on the petitioner," Brief in Opposition at 7, it is perhaps more significant that the jury was never told that OSHA noise exposure regulations do *not* apply to locomotive cabs. Instead, the jury was repeatedly informed during trial of the existence and content of the OSHA regulations and of petitioner's noncompliance with those regulations. In addition, the court specifically instructed the jury on the existence and content of the OSHA regulations and told them to consider the regulations "as evidence of negligence." It would be an odd juror indeed who could have come away from this process with the opinion that the OSHA noise exposure regulations did not apply to the petitioner's conduct.

[8] *See also Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *E.I. Du Pont De Nemours v. Berkley & Co., Inc.*, 620 F.2d 1247, 1258 n.8 (8th Cir. 1980) (new trial appropriate unless "it is reasonably certain that the jury was not significantly influenced by the issues erroneously submitted to it"); *Jordan v. Medly*, 711 F.2d 211, 219 (D.C. Cir. 1983) (new trial appropriate unless one can say "with fair assurance . . . that the judgment was not substantially swayed by the error").

OSHA regulations and the petitioner's noncompliance with those regulations. As the Fifth Circuit recently held in a section 4(b)(1) preemption case, instructing a jury that "violation" of an inapplicable OSHA standard "is evidence of negligence" *is reversible error* because it "creates 'a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.'" *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216, 218-19 (5th Cir. 1984), quoting, *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981). It is simply impossible on this record to reasonably conclude that the jury would have ruled against petitioner if there had been no discussion of or instruction on the inapplicable OSHA regulations, and thus the error below was not harmless.[9]

3. Respondent's attempt to downplay the circuit splits on section 4(b)(1) preemption is also unavailing. Although respondent professes an inability to see these circuit splits, the courts themselves apparently labor under no such disability. *See, e.g., Donovan v. Red Star Marine Services*, 739 F.2d 774, 778 (2d Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) ("circuit and district courts . . . have not interpreted section 4(b)(1) consistently"); *Marshall v. Northwest Orient Airlines*, 574 F.2d 119, 122 (2d Cir. 1978) (noting conflict between Fourth and Fifth Circuits on the interpretation of "working conditions," the court stated "[t]he exact standard to be applied in determining the scope of preemption, however, is less

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[9] The fact that OSHA's noise regulations were not promulgated until 1973, while respondent's exposure began in 1956, is also insufficient to clear the harmless error hurdle. The erroneously submitted OSHA regulations were a major element of respondent's case, and one certainly cannot say with "fair assurance" or "reasonable certainty" that the jury was not swayed by petitioner's noncompliance with those government standards. In any event, the defective instruction included no temporal limitation on the jury's consideration of the OSHA regulations as "evidence of negligence."

than crystal-clear"); *Columbia Gas v. Marshall*, 636 F.2d 913, 916-17 & n.8 (3d Cir. 1980) (adopting the Fourth Circuit's "environmental area" definition of "working conditions" in lieu of "the more fluid definition" developed in the Fifth Circuit); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 392 n.10 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977) (describing its interpretive approach as "more attuned to the differing possible meanings of the term 'working conditions' as it is used elsewhere in the field of industry relations" than that of the Fourth Circuit). As noted in the petition, these conflicts not only exist and cause inconsistent results in real cases, they impact all of the employers and the employees in many of the nation's largest industries. *See* Petition at 11.

Respondent's final attempt to draw the Court's attention away from these obvious and important circuit splits is his assertion that this case does not raise the section 4(b)(1) issue. On the contrary, the court below was clearly presented with the section 4(b)(1) preemption issue; counsel for petitioner repeatedly argued that FRA preemption barred the admission of and instruction on OSHA noise exposure regulations. *See* Petition at 8. Nevertheless, the court admitted the OSHA regulations into evidence and instructed the jury that they could consider noncompliance with those regulations as evidence of negligence. *See* Petition at 6a-7a. Section 4(b)(1) preemption was properly raised and ruled upon.

4. Finally, respondent claims that it would be improper for this Court to consider the FELA choice of forum provision in deciding whether to grant the petition. Respondent misapprehends petitioner's argument. It is not petitioner's position that this Court should grant it "relief" from FELA's choice of forum provision. Nor does petitioner assert that the mere existence of forum shopping would warrant this Court's review. Petitioner does contend that the unique FELA choice of forum pro-

vision magnifies the importance of any error or court split on an issue of substantive law relevant in FELA proceedings. Because plaintiffs can choose from a variety of forums, the decision of a single court affects more parties and has a greater economic impact than it would if forum choice were more restricted. *See* Petition at 15-19.[10]

Such concerns are surely relevant to this Court's exercise of its discretionary review authority, and they support the grant of this petition. Despite respondent's protestations to the contrary, the existence of a court split on the proper interpretation of section 4(b)(1) and the decision of the court below do have a "profound" effect on an enormous number of employees and employers who have both a right and a need to know which federal regulations govern their employment relationships.

At bottom, respondent's Brief in Opposition does nothing to undermine petitioner's showing that this case presents an important and recurring question of federal law concerning the proper approach in determining the jurisdictional boundaries of the various federal agencies that regulate workplace safety. Moreover, the respondent does not, and cannot, dispute that the decision below could have a longstanding impact that extends far beyond the parties to this case. Given the importance of a definite and certain interpretation of section 4(b)(1) to employees and employers throughout the nation, and the clear presentation of that issue in this case, the Court should grant this petition.

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[10] "One of the purposes of the federal employers' liability act was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 493 n.5 (1980), quoting, H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908).

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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